APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1971

Case No. 40,156

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 16, 1971

An appeal from the District Court of Appeal, Second District

Malory B. Frier, for Appellant

William Reece Smith, Jr., City Attorney and Gerald H. Bee, Assistant City Attorney, for Appellee

ADKINS, J.

This is an appeal from a decision of the District Court of Appeal, Second District (*Shadwick v. City of Tampa,* 237 So.2d 231), which directly and initially passed upon the validity of certain statutes.

The only question involved is whether FLA. STAT. (1967) § 168.04, F.S.A., and §§ 495 and 160.1 of the Charter of the City of Tampa (the provisions of these statutes are included in the District Court of Appeal opinion, 237 So.2d 231, 232) are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for arrest. The Florida Constitution provides that special laws or gen-

eral laws of local application may be enacted by the Legislature pertaining to the duties of municipal officers. FLA.CONST. art III, § 11(a)(1) (1968). Similar provisions were included in the earlier constitution. FLA. CONST., art. III § 20 (1885). Pursuant to this authority, the Legislature enacted special laws pertaining to the duties of clerks and deputy clerks of the municipal courts in the City of Tampa, and incorporated in the Charter of the City of Tampa provisions authorizing the clerk of the municipal court to issue warrants for arrest. The powers granted the clerk of the municipal court, or his deputies, in the special law were not incompatible or in conflict with the general laws of the State of Florida. See FLA. STAT. § 168.04 (1967); *Headley v. State,* 166 So.2d 479 (Fla.App.3d, 1964).

Appellant says the clerk or deputy clerk of the municipal court is not a judicial officer such as could perform the duties of determining probable cause or act as a neutral or detached magistrate in the exercise of a judicial discretion to determine the existence of probable cause. However, the detrmination of probable cause for an arrest need not be confined to strictly judicial officers, as such a function is only quasi-judicial. *Ocampo v. U. S.,* 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914).

Therefore, the statutes authorizing a clerk or deputy clerk of a municipal court to issue arrest warrants are not an unconstitutional exercise or delegation of "judicial power" and conform to the requirement of the Fourth and Fourteenth Amendments to the Constitution of the United States. See *Florida Motor Lines v. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930).

The general law is stated in 22 C.J.S., *Criminal Law,* § 318, pp. 820, 821, as follows:

> "When so provided by statute, the authority to issue warrants may be vested in officers whose other duties are purely ministerial, such as clerks, * * * ."

and further in 15 Am.Jur.2d, *Clerks of Court* § 22, pp. 528, 529:

"A clerk of court may not exercise judicial power except by constitutional or *legislative provision,* and then only in accordance with the strict language of the provision. * * *

"Certain acts, although partially judicial in nature, may be performed by the clerk of the court. A familiar example is the power to issue warrants of arrest." (Emphasis supplied)

Arrest warrant procedure requires that inferences from facts which lead to the complaint "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. U.S.,* 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958). The word "magistrate" has been given a broad meaning. In a general sense, a magistrate is a public officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain although in a narrow sense he is regarded as an inferior judicial officer. See *J. D. Compton v. State of Alabama,* 214 U.S. 1, 29 S.Ct. 605, 607, 53 L.Ed. 885 (1909); *State ex rel. Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630 (1940). The clerk and deputy clerks of the municipal court of the City of Tampa are neutral and detached "magistrates," unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the United States Constitution, Fourth and Fourteenth Amendments, and FLA. CONST. art I, § 12 (1968), by virtue of the Florida Statutes fixing their powers and duties to issue arrest warrants.

The opinion and decision of the District Court of Appeal is approved and affirmed.

ROBERTS, C. J., ERVIN, CARLTON, McCAIN, DEKLE and DREW, (Retired), JJ., concur

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JULY TERM, A. D. 1970

CASE NO. 70-62

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 24, 1970

Appeal from the Circuit Court
for Hillsborough County

Neil C. McMullen, Judge.
Malory B. Frier, Tampa, for Appellant.

Gerald H. Bee, Assistant City Attorney, Tampa,
for Appellee.

HOBSON, CHIEF JUDGE.

Appellant was charged in Tampa Municipal Court of careless driving while his ability to drive was impaired. He had been arrested under a warrant issued in the name of the city clerk of the City of Tampa, and signed by a deputy clerk. Appellant moved to quash the warrant in the municipal court on the grounds that the issuance of a warrant by a city clerk was the exercise of a judicial function by a non-judicial officer, and therefore a violation of the separation of powers under Fla. Const. Art. II, § 3 (1968), and Fla. Const. Art, V, § 1 (1968) which vests the judicial power in the courts of the state. Appellant's motion was denied, and he petitioned the Circuit Court of Hillsborough County for a writ of common law certiorari to review the denial of motion to quash the warrant. The petition was denied by the Circuit Court, and the appellant appealed to the

Supreme Court of Florida. The Supreme Court found the matter to be within the jurisdiction of this court and transferred the case here.[1]

Appellant contends that Fla.Stat. § 168.04 (1967),[2] and Sections 495[3] and 160.1[4] of the charter of the City of Tampa are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest. These and like provisions have been dealt with before by Florida courts,[5] but the constitutionality of the procedure has not been raised in this state.

Appellant contends that the decision as to whether a warrant should issue is a judicial function and that because the legislature may not exercise judicial functions, it may not delegate judicial functions by statute

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[1] F.A.R. 2.1(a)(5)(d).

[2] FLA. STAT. § 163.04 (1967): "CLERK AND MARSHAL MAY TAKE AFFIDAVITS AND ISSUE WARRANT.
"The clerk may administer an oath to and take affivadit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against."

[3] LAWS OF FLA. 1903, Ch. 5363, §17:
"The chief of police, or any policeman of the city of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

[4] LAWS OF FLA. 1961, Ch. 61-2915, §1:

[5] United States v. Melvin, 258 F.Supp. 252 (S.D. Fla. 1966); Headley v. State ex rel. Bethune, 166 So.2d 479 (Fla. App. 3d 1964).

to non-judicial officers. We disagree, and hold that the decision whether to issue a warrant is, at most, quasi-judicial and not within the "judicial power" reserved by the constitution to the judicial branch. *See generally* Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930) *E.g.* Kreulhaus v. City of Birmingham, 164 Ala. 623, 51 So. 297 (1909); State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968); State v. Thompson, 151 S.E.2d 870 (W.Va. 1966); *cf.* State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959). *Contra,* State v. Paulick, 277 Minn. 140, 151 N.W.2d 591 (1967).

State v. Paulick, supra, relied upon heavily by appellant, dealt with the very question before this court in the case sub judice. There, the Supreme Court of Minnesota held that a statute which vested authority to issue arrest warrants in clerks of municipal courts was unconstitutional as a violation of the separation of powers. Although the court's opinion is scholarly and appealing, we chose to follow the reasoning of the Supreme Court of New Jersey in State v. Ruoloto, supra. The court stated at pages 3-5:

> "With regard to the issuance of a warrant, there is no doubt that if a determination of 'probable cause' is to have any meaning, it must be made by a neutral and detached court official who is immune from 'the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, 92 L.Ed. at 440."
>
> * * * * *
>
> "A finding of neutrality, however, goes only part of the way to justify the challenged procedure. Before a deputy clerk is constitutionally permitted to determine whether the facts as alleged by the complainant constitute probable cause that an offense has been committed and that the defendant is the culprit, we must ask: Is the deputy clerk qualified to exercise the necessary judgment?"
>
> * * * * *

"[W]e believe that background in the law, although desirable, is not a requirement imposed by the Constitution on a determination of probable cause. After all, probable case [sic] is a standard which is designed to be applied by laymen. A policeman may make an arrest without a warrant where there is probable cause, i.e., where there are facts which would lead 'a man of reasonable caution' to believe a crime has been or is being committed."

* * * * *

"Throughout the history of this country laymen have served in various judicial capacities, and particularly in order to determine the existence of probable cause. United States Commissioners, appointed by the United States District Courts, have been invested with the power to issue arrest warrants in federal prosecutions. Fed. Rules Crim. Procedure 3, 4. Today, almost one-third of the United States Commissioners are laymen. See Staff Memorandum, Subcommittee on Improvements in Judicial Machinery, reported in Hearings, Senate Judiciary Committee, Federal Magistrates Act, 1967, p. 30. A grand jury, from which lawyers are routinely excluded, applies the standard of probable cause in determining whether to return an indictment. Grand jurors and petit jurors apply sundry rules of law to factual complexes; our jury system rests upon the premise that one need not be a lawyer to understand guiding principles and to make judgments in the light of them.'

We feel that the emphasis should not be placed upon fine distinctions between judicial officers and non-judicial officers, but instead upon the requirement that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces of

law enforcement[6] and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public.

Appellant argues that the city, by allowing the clerk to issue arrest warrants, was providing nothing more than a "rubber stamp" for the police. If this were the case, it would be clearly unacceptable. However, there is nothing in the record to substantiate this allegation.

For the reasons stated, we hold the challenged statutes constitutional and the order appealed is

AFFIRMED.

LILES and McNULTY, JJ., CONCUR.

[6] *E.g.* State v. Mathews, 270 N.C. 35, 153 S.E. 2d 791 (1967); State ex rel. White v. Simson, 28 Wis. 2d 590, 137 N.W. 2d 391 (1965).

APPENDIX B

1. Florida Statute (1967), Section 168.04, F.S.A.

   The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaint and issue warrants for the arrest of persons complained against.

2. Section 495, Charter of the City of Tampa, enacted by Laws of Fla. 1903, Ch. 5363, Section 17.

   The Chief of Police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person.

3. Section 160.1, Charter of the City of Tampa, enacted by Laws of Fla. 1961, Ch. 61-2915, Section 1.

   The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the appproved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court.

APPENDIX C

IN THE MUNICIPAL COURT OF THE
CITY OF TAMPA, FLORIDA

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH) AFFIDAVIT

To the Chief of Police or any Policeman of the City of Tampa, whereas, Cpl. W. H. Larder, City of Tampa Police Department, Tampa, Florida has this day made complaint before me that on the 8th day of February, A.D. 1969, in the City aforesaid, one Gerald Shadwick, 14912 Pine Crest, Tampa, Florida did unlawfully DRIVE A VEHICLE IN A CARELESS MANNER IN DISREGARD FOR THE SAFETY OF PERSONS OR PROPERTY WHILE HIS ABILITY TO DRIVE A MOTOR VEHICLE IS IMPAIRED BY ALCOHOL OR DRUG. 36-89B City of Tampa Code.

W. H. LARDER
Affiant

GERALD SHADWICK
Defendant

Sworn to and subscribed before me this 6th day of March, A.D. 1969.

W. L. STARK, City Clerk

By Deputy NELSON P. GULLO
City Clerk of the City of Tampa

No. 64028

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

This is to certify that the above and foregoing is a true and correct copy of the Affidavit for Warrant in the Municipal Court, in the case of the City of Tampa vs. Gerald Shadwick as the same appears of record in Municipal Court Docket No. F156951, Warrant No.64028, Record of the Municipal Court of the City of Tampa, Florida.

Dated this 14th day of April, A.D. 1969.

W. L. STARK, City Clerk

By ROBERT D. CARDEN, D. C.

IN THE MUNICIPAL COURT OF THE
CITY OF TAMPA, FLORIDA

STATE OF FLORIDA }
COUNTY OF HILLSBOROUGH } WARRANT

To the Chief of Police or any Policeman of the City of Tampa, whereas, Cpl. W. H. Larder, City of Tampa Police Department, Tampa, Florida has this day made complaint before me that on the 8th day of February, A.D. 1969, in the City aforesaid, one Gerald Shadwick, 14912 Pine Crest, Tampa, Florida did unlawfully DRIVE A VEHICLE IN A CARELESS MANNER IN DISREGARD FOR THE SAFETY OF PERSONS OR PROPERTY WHILE HIS ABILITY TO DRIVE A MOTOR VEHICLE IS IMPAIRED BY ALCOHOL OR A DRUG, 36-89B City of Tampa Code.

These are therefore to command you to arrest the body of Gerald Shadwick, the said defendant, and bring him before the Judge of the Municipal Court of the City of Tampa, Florida, to be dealt with according to law.

Given under my hand and seal of said City this 6th day of March, A.D. 1969.

W.. L. STARK, City Clerk

By Deputy NELSON P. GULLO
City Clerk of the City of Tampa

No. 64028

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

This is to certify that the above and foregoing is a true and correct copy of the Warrant in the Municipal Court, in the case of the City of Tampa vs.. Gerald Shadwick, as the same appears of record in Municipal Court Dockket No. F156951, Warrant No. 64028, Record of the Municipal Court of the City of Tampa, Florida.

Dated this 18th day of April, 1969.

W. L. STARK, City Clerk

ROBERT D. CARDEN, D. C.

IN THE MUNICIPAL COURT OF THE
CITY OF TAMPA, STATE OF FLORIDA

F156951

CITY OF TAMPA, Plaintiff,
vs.
GERALD SHADWICK, Defendant.

MOTION TO QUASH WARRANT

COMES NOW the defendant, GERALD SHADWICK, by his undersigned attorney and moves the Court to quash the warrant heretofore issued out of this Court on the 6th day of March, 1969, and the docket entry made pursuant thereto upon the following grounds and each of them:

1. Said warrant of arrest was issued by a non-judicial officer, to wit, W. L. Stark, City Clerk, contrary to the express provisions contained in Section III of Article II of the Florida Constitution of 1968.

2. Although the revised charter of the City of Tampa of 1927, in Section 22 thereof, now appearing in Section 159 of Chapter IX of the compiled City Charter of the City of Tampa purports to make the City Clerk of the City of Tampa ex officio Clerk of the Municipal Court, said Charter did not authorize the City Clerk of the City of Tampa, a non-judicial officer, to exercise any judicial duties, and specifically, did not authorize said Clerk to issue warrants for arrests, said powers being reserved to the Municipal Judge of the City of Tampa in Section 21 of the revised Charter of 1927, now contained in Section 410 of the compiled Charter of the City of Tampa.

3. Although Chapter 61-2915, Special Acts of 1961, of the laws of Florida, in Section I thereof, now contained in Section 160.1 of the compiled Charter of the City of Tampa purports to authorize the City Clerk of the City of Tampa, with the approval of the Mayor, to

appoint one or more deputies to have and exercise the same powers as the City Clerk himself, including but not limitd to the issuance of warrants, said Special Act did not specify whether said warrants which said deputy clerks were authorized to issue, were warrants for arrest, warrants for the payments of moneys, or distress warrants to collect taxes, and that in any event, the City Clerk for the City of Tampa not ever having possessed powers to issue warrants for arrest of persons under the City of Tampa Charter, none of his deputies can possess any powers which the City Clerk, himself, does not possess.

4. That in any event, insofar as Section I of Chapter 61-2915, Special Acts, Laws of Florida, 1961, purport to empower the City Clerk or any of his deputies, for the City of Tampa, to issue warrants for arrest, the same is invalid, unconstitutional and void by attempting to vest judicial powers in a non-judicial officer, contrary to the express language contained in Section III of Article II of the Constitution of Florida of 1968.

I do certify that a true copy of the foregoing Motion has been furnished to the City Attorney for the City of Tampa, by delivery, at the Police Station in the City of Tampa, this 13th day of March, 1969.

MALORY B. FRIER
Attorney for Defendant
LAW, Inc. of Hillsborough County
8145 Nebraska Avenue
Tampa, Florida 33604

CERTIFICATE OF CLERK

I hereby certify that the above and foregoing is a true and correct copy of Motion Filed and Judgement of the Municipal Court, in the case of the City of Tampa vs. Gerald Shadwick as the same appears of record in Municipal Court Docket No. F156951, Record of the Municipal Court of the City of Tampa, Florida.

Dated this 14th day of April, A.D. 1969.

W. L. STARK, City Clerk
By ROBERT D. CARDEN, D. C.

IN THE MUNICIPAL COURT OF THE CITY OF TAMPA, STATE OF FLORIDA.

F156951

CITY OF TAMPA, Plaintiff,
vs.
GERALD SHADWICK, Defendant.

ORDER DENYING MOTION TO QUASH

This cause having come on for hearing pursuant to rule of Court upon the Motion of the defendant to Quash the warrant issued by the City Clerk as ex officio Clerk of this Court on the 6th day of March, 1969, and the Court having heard argument of counsel and read briefs filed by defense counsel in support of said motion, it is.

ORDERED that the defendant's Motion to Quash said warrant is hereby denied.

DONE AND ORDERED at Tampa, Florida, the 7th day of April, 1969 nunc pro tunc this 18th day of April, 1969.

CHARLES H. SCRUGGS, III
Judge.

CLERK'S CERTIFICATE

I hereby certify that the above and foregoing is a true and correct copy of Order Denying Motion to Quash in the Municipal Court, in the case of the City of Tampa vs. Gerald Shadwick, as the same appears of record in Municipal Court Docket No. F156951, Record of the Municipal Court of the City of Tampa, Florida.
Dated this 18th day of April A. D. 1969.

W. L. STARK, City Clerk

By ROBERT D. CARDEN, D. C.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
Division H

No. 177715

GERALD SHADWICK, Petitioner,
vs.
CITY OF TAMPA, Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner, GERALD SHADWICK, respectfully represents unto this Honorable Court as follows:

1. This is a Petition for Writ of Common Law Certiorari directed to the Municipal Court of the City of Tampa, Florida, under and pursuant to the provisions of Rule 1.640, of the Rules of Civil Procedure.

2. Petitioner was arrested by a City Police Officer of the respondent, City of Tampa, on the 6th day of March, 1969, under color of a warrant issued on that date in the name of W. L. Stark, City Clerk, and signed by Nelson P. Gulle, as Deputy Clerk.

3. On the 11th day of March, 1969, the petitioner filed a Motion in the Municipal Court of the City of Tampa, Florida, to Quash said warrant and the docket entry made pursuant thereto upon the grounds that said warrant was issued by a non-judicial officer, namely the City Clerk of the City of Tampa, who was not vested with judicial powers.

4. Said Motion came on for hearing before said Municipal Court on the 7th day of April, 1969, at which time said Motion was denied by said Municipal Court.

5. This Petition for Writ of Certiorari is accompanied by a certified transcript of the record of the pro-

ceedings petitioner seeks to have reviewed, pursuant to the provisions of Rule 1.640 of the Rules of Civil Procedure, including the following items:

A. Affidavit of Corporal W. H. Larder, dated March 6,, 1969.

B. The warrant issued March 6, 1969, under which petitioner was arrested as aforesaid.

C. Defendant's Motion to Quash said warrant filed March 11, 1969.

D. The Order of the Municipal Court for the City of Tampa, denying said Motion to Quash, entered April 7, 1969, nunc pro tunc on April 18, 1969.

6. By the record so made, petitioner would show unto this Honorable Court that said Municipal Court did not proceed in said cause according to the essential requirements of the law, in the following matters and for the following reasons, to wit:

A. The City Clerk for the City of Tampa is a ministerial officer and is not possessed of judicial powers either under Section 22 of the Revised Charter of the City of Tampa of 1927 (Compiled Charter of the City of Tampa, Section 159) or under Section 1, Chapter 61-2915, Special Acts of the Legislature, Laws of Florida 1961 (Section 160.1 of the Compiled Charter of the City of Tampa), said power to issue warrants of arrest being expressly reserved to the Municipal Judges of the Municipal Court of the City of Tampa by Section 21 of the Revised Charter of 1927 for the City of Tampa (Section 410 of the Compiled Charter of the City of Tampa).

B. That insofar as Section 168.04 of the Florida Statutes purports to vest judicial powers in the City Clerk for the City of Tampa to issue arrest warrants, or insofar as any attempt is made to read such powers into the City Charter of the City of Tampa, the same are clearly invalid and unconstitutional for the reason that the same violates the

Separation of Powers clauses contained in Section 3 of Article II and Section 1 of Article V of the Constitution of Florida, as well as the due process and equal protection clauses contained in Sections 2 and 9 of Article 1 of the Constitution of Florida and the Fifth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, the premises considered, petitioner prays that this Honorable Court will grant unto your petitioner a Writ of Certiorari directed to the Municipal Court of the City of Tampa, Florida, requiring that the record of said Court, together with the Order of said Court Denying Petitioner's Motion to Quash the warrant in said cause, be certified to this Court and that this Honorable Court will thereupon proceed to review the same and determine that the said Order Denying Petitioner's Motion to Quash said warrant is erroneous and void for the reasons heretofore pointed out, and will Quash the same and grant unto your petitioner such further and other relief as the nature of the case may require and as to this Court may seem proper in the premises.

MALORY B. FRIER
Attorney for Petitioner
LAW, Inc. of Hillsborough County
8145 Nebraska Avenue
Tampa, Florida 33604

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, the undersigned authority, personally came Malory B. Frier, who being by me first duly cautioned and sworn upon oath deposes and says that he is the attorney for the Petitioner in the above styled cause and as such, is duly authorized to make this affidavit for and in behalf of said Petitioner; that he has read and knows the contents of the above and foregoing Petition for Writ of Certiorari and that the same is true.

MALORY B. FRIER
MALORY B. FRIER

Sworn to and subscribed before me at Tampa, Florida, this 23rd day of April, 1969.

EVELYN F. RODRIGUEZ
Notary Public
My Commission Expires: 10-21-72

CERTIFICATE OF SERVICE

I do certify that a true copy of the foregoing Petition has been furnished to the City Attorney, whose office is located in the City of Tampa Police Station, by delivery, this 23rd day of April, 1969.

MALORY B. FRIER

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA, HILLSBOROUGH COUNTY, CIVIL ACTION

Case No. 177,715

Division "H"
GERALD SHADWICK, Petitioner,
vs.
CITY OF TAMPA, Respondent.

ORDER DENYING WRIT OF CERTIORARI

THIS CAUSE came on to be heard before the Court uppon Petition for issuance of Writ of Certiorari, the Court having heard and considered the arguments of respective counsel together with the Briefs filed by both the Petitioner and Respondent, and the Court being otherwise fully advised in the premises, it thereupon,

CONSIDERED, ORDERED and ADJUDGED that Issuance of Writ of Certiorari on Petition therefore, be, and the same is herein and hereby, denied.

DONE AND ORDERED in Chambers at Tampa, Florida, this 23rd day of July, 1969.

NEIL C. MCMULLEN, Circuit Judge

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA, HILLSBOROUGH COUNTY, CIVLL ACTION

Case No. 177,715
Division "H"

GERALD SHADWICK, Petitioner,
vs.
CITY OF TAMPA, Respondent.

ASSIGNMENTS OF ERROR

GERALD SHADWICK, the petitioner, hereby assigns the following errors for review on his appeal to the Supreme Court of Florida:

1. The Trial Court erred by entering the Order Denying Writ of Certiorari, dated July 23, 1969, and rendered and recorded July 24, 1969 in Circuit Court Order Book 722 at page 705 of the public records of Hillsborough County, Florida.

2. The Trial Court erred by refusing to grant the Petition for Writ of Certiorari directed to the Municipal Court for the City of Tampa, Florida, as prayed in the Petition.

3. The Trial Court erred by refusing to quash the Order of the Municipal Court of the City of Tampa, Florida, dated and rendered April 7, 1969 which denied petitioner's Motion to Quash an arrest warrant issued by a deputy clerk of said Municipal Court without prior determination of probable cause by a judicial officer.

I do certify that a true copy of the foregoing Assignments of Error has been furnished to William Reece Smith, Jr., City Attorney, P. O. Box 3239, Tampa, Florida 33601 and to Gerald H. Bee, Assistant City Attorney, 729 First Federal Building, Tampa, Florida 33602, Attorneys for respondent, by mail, this 21st day of August, 1969.

MALORY B. FRIER
Attorney for Petitioner
LAW, Inc. of Hillsborough County
8127 Nebraska Avenue
Tampa, Florida 33604

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

Case No. 70-62

GERALD SHADWICK, Appellant,
vs.
CITY OF TAMPA, Appellee.

PETITION FOR REHEARING

The appellant, GERALD SHADWICK, petitions this Honorable Court to grant a rehearing upon his appeal, pursuant to the provisions of Rule 3.14 F.A.R., and would show unto the Court as follows:

1. The statement contained in the first sentence of this Court's opinion filed June 24, 1970, that the appellant had been "convicted" of the offense of "driving under the influence" of alcohol or drugs is apparently the result of an oversight or clerical error in two respects, to wit:

a. The appellant has not been convicted of any offense, but has merely sought timely relief from an arrest warrant he believes invalid in order not to foreclose that right by voluntarily submitting himself to the jurisdiction of the Municipal Court. See appellant's Petition for Writ of Certiorari (R1) and appellant's brief at pages 2 through 5.

b. Appellant has not been charged with "driving under the influence" but has been charged with the lesser offense of "careless driving" while his "ability to drive is impaired." See the affidavit of W. H. LARDER, dated March 6, 1969, and the arrest warrant issued the same date. (R 4 and 5).

2. The statement contained in the next to the last sentence of said opinion that there is nothing in the record on this appeal to substantiate appellant's accusa-

tion that allowing the Clerk to issue arrest warrants merely provided a rubber stamp for the police overlooks or fails to consider the warrant (R5) and the affidavit upon which it was issued (R4) contained in the record on appeal. While the documents contained in the record on appeal are merely xerox or photographic reproductions of the original affidavit and warrant, an inspection of those documents reveals the following matters which the Court failed to consider:

a. The affidavit and warrant are pre-printed forms constituting a single unit or set whereby carbon paper is merely inserted between the affidavit and the warrant, the blank spaces (excepting the specific charge are filled in by typewriting on the affidavit in such a manner as to cause the same words and figures to be copied onto the warrant by the carbon paper. (Note positioning of the date on the warrant and compare with the affidavit.)

b. The charge contained in both the affidavit and the warrant was actually stamped therein with a rubber stamp consisting of a mere conclusion stated in the language of the ordinance cited without any affirmative allegations that the complaining officer spoke with personal knowledge of the matter contained therein and without otherwise indicating any sources for the officer's belief or setting forth any other sufficient basis upon which a finding of probable cause could be made sufficient to authorize the issuance of an arrest warrant because such deficiencies cannot be cured by the reliance of any *judicial officer* upon a presumption that the affidavit was made upon personal knowledge of the complaining officer under the rule announced by the United States Supreme Court in Giordenello v. U.S., 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245, cited at page 6 of appellant's brief.

3. By citing Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930) as authority for the proposition that the exercise of "quasi-judicial"

powers does not constitute the exercise of "judicial power" under the State Constitution, the Court overlooked or failed to consider Article V, Section 35, of the Florida Constitution as amended in 1910 which expressly authorized the Legislature to grant judicial powers to the Florida Railroad Commission, and upon which the Florida Supreme Court relied in that case. See 129 So. at pages 881 and 883.

4. By relying upon the New Jersey decision of State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968), the Court overlooks or fails to consider the fallacy implicit in that Court's reasoning in the following particulars:

a. The fact that one-third of all U. S. Commissioners are laymen does not alter the fact that they are, in fact, judicial officers with limited trial jurisdiction under Title 18, Section 3401, U. S. Code, enacted by Congress pursuant to authority contained in Article I, Section 8, Clause 9 of the United States Constitution.

b. The fact that Grand Jurors and petit jurors apply sundry rules of law to factual situations does not alter the fact that the Clerk of the Municipal Court does not receive a "charge" or instructions from the Court such as jurors received from the presiding judge, or others legally knowledgeable which he can substitute for his independent knowledge or lack of knowledge of the law.

c. The fact that policemen may arrest without warrant upon probable cause in felony cases overlooks the rule started in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 122 L.Ed. 2d 723 (1964) cited at page 6 of appellant's brief, that a magistrate's determination of probable cause for the issuance of a warrant may be based upon less judicially competent or persuasive evidence than is permitted for policemen when so acting. See 378 U.S. at 111.

5. Finally, this Court's decision that the Legislature may constitutionally delegate to a Court Clerk the "quasi-judicial" authority to determine the existence of probable cause for the issuance of arrest warrants overlooks or fails to consider the decision of the Florida Supreme Court in Otto v. Harllee, 119 Fla. 226, 161 So. 402 (1935), cited at page 7 of appellant's brief that determination of the sufficiency of property descriptions in tax certificates was a judicial function which the same Legislature is prohibited from delegating to such a Court Clerk, and the resulting implication that decisions involving human liberty are not as important and do not possess the same gravity as decisions involving mere property rights.

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CERTIFICATE OF SERVICE

I do certify that a true copy of the foregoing Petition for Rehearing has been furnished by U. S. Mail to WILLIAM REECE SMITH, JR., City Attorney, and GERALD H. BEE, Assistant City Attorney, 729 First Federal Building, Tampa, Florida, this 7th day of July, 1970.

MALORY B. FRIER
Attorney for Appellant

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

Case No. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND APPELLATE DISTRICT
OF FLORIDA

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CERTIFICATE OF SERVICE

I DO CERTIFY that a true copy of the within Appellant's Brief has been furnished to Wm. Reece Smith, Jr., and Gerald H. Bee, Attorneys for Appellee, by mail, this 30th day of November, 1970.

MALORY B. FRIER
Attorney for Appellant

STATEMENT OF THE CASE

This is an appeal from the decision of the District Court of Appeal, Second District of Florida, which has been reported as Gerald Shadwick, Appellant vs. City of Tampa, Appellee, (Fla. App. 2, 1970), 237 So.2d 231. The appellant, Gerald Shadwick, who was also the appellant in the District Court of Appeal, and the petitioner in the common-law certiorari proceeding in the Circuit Court for Hillsborough County, Florida, was originally defendant in the Municipal Court for the City of Tampa, Florida. The appellee, City of Tampa, who was also the appellee in the District Court of Appeal and the respondent in said Circuit Court proceeding, was the prosecuting authority in said Municipal Court proceeding. The following symbols will be used in this Brief:

"R"—Record on Appeal;

"A"—Appendix to Appellant's Brief.

The proceedings which have culminated in the filing of this appeal originated in the Municipal Court for the City of Tampa, Florida, on March 6, 1969, when Corporal W. H. Larder of the City of Tampa Police Department, subscribed and swore to an Affidavit (A 6) before Nelson P. Gullo, as Deputy for W. L. Starke, City Clerk of the City of Tampa, and who thereupon issued a warrant (A 7) for the arrest of the appellant to answer a charge of careless driving while his ability to drive was impaired by alcohol or a drug. The appellant was arrested the same date, and on March 13, 1969, filed his written motion in said Municipal Court to quash that warrant upon the ground that the issuance of such a warrant was the exercise of a judicial function by a non-judicial officer in violation of the separation of powers clause contained in Article II, Section 3 and Article V, Section 1, Florida Constitution of 1968, which vests the judicial power of this state in certain enumerated courts, and that the provisions of the City of Tampa Charter purporting to authorize the issuance of ar-

rest warrants by the City Clerk was, therefore, an unconstitutional delegation of judicial powers. (R 6) Appellant's motion was denied by the Municipal Court on April 7, 1969 (R 8), and on April 23, 1969, appellant filed his petition with the Circuit Court for Hillsborough County, seeking a writ of common-law certiorari to review that order upon the ground that the denial of his Motion to Quash constituted a departure from the essential requirements of law because the warrant procedure and charter provision authorizing it, as well as the general state statute authorizing it, not only violated the cited provisions of our state constitution, but also violated the due process clauses contained in Article I, Sections 2 and 9 of the Florida Constitution of 1968, and the Fourteenth Amendment to the United States Constitution. (R 1) The Circuit Court denied the petition for common-law certiorari (R 9), and the appellant took a timely appeal from that decision to this Court which transferred the same to the District Court of Appeal, Second District of Florida, on January 14, 1970. The District Court of Appeal ultimately rendered its opinion on June 24, 1970 (A 1), and denied appellant's petition for a rehearing (R 62) by an order entered August 5, 1970. (R 66) Within 30 days after that Court's denial of his petition for rehearing, the appellant timely filed his notice of appeal to this Court, pursuant to Article V, Section 4 (2), Florida Constitution, because the District Court's decision directly and initially passed upon the validity of Statutes of this State.

Included in the Appendix to this Brief are the *revised*[1] opinion of the District Court of Appeal (A 1-5), as well as xerox copies of the Affidavit and Warrant attacked (sic.) (A 6, 7) and the applicable sections of the Compiled Charter of the City of Tampa. (A 8-10).

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[1] The original opinion as printed in the Southern Reporter Advance Sheets at 237 So.2d 231 was "revised" by the District Court of Appeals to correctly state that appellant had merely been "charged" (and not convicted) with "careless driving while his ability to drive was impaired" (and not driving under the influence of alcohol or drugs), in response to appellant's petition for rehearing.

POINTS INVOLVED ON APPEAL

I. WHETHER THOSE PROVISIONS OF THE CITY OF TAMPA CHARTER, AS WELL AS SECTION 168.04, FLORIDA STATUTES, WHICH PURPORT TO AUTHORIZE THE CITY CLERK FOR THE CITY OF TAMPA TO ISSUE ARREST WARRANTS WITHOUT ANY DETERMINATION OF PROBABLE CAUSE BY A JUDGE OR MAGISTRATE, ARE AN UNCONSTITUTIONAL DELEGATION OF JUDICIAL POWER?[2]

The lower Court answered this question in the negative.

ARGUMENT

I.

THOSE PROVISIONS OF THE CITY OF TAMPA CHARTER, AS WELL AS SECTION 168.04, FLORIDA STATUTES, WHICH PURPORT TO AUTHORIZE THE CITY CLERK FOR THE CITY OF TAMPA TO ISSUE ARREST WARRANTS WITHOUT ANY DETERMINATION OF PROBABLE CAUSE BY A JUDGE OR MAGISTRATE ARE AN INVALID AND UNCONSTITUTIONAL DELEGATION OF JUDICIAL POWERS.[3]

(A) BOTH THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE 1968 FLORIDA CONSTITUTION PROHIBIT THE ISSUANCE OF AN ARREST WARRANT WITHOUT A PRIOR DETERMINATION OF PROBABLE CAUSE.

The Fourth Amendment to the United States Constitution guarantees that no warrant shall issue for the

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[2] This question is raised by Assignments of Error numbered 1 & 2.

[3] Raised by Assignments of Error numbered 1 and 2.

arrest of any persons except upon probable cause supported by oath or affirmation.[4]

Article I, Section 12 of the 1968 Florida Constitution, and its forerunner, Section 22 of the Declaration of Rights contained in the Florida Constitution of 1885, contained similar wording.[5]

The Supreme Court of the United States has held that the restrictions imposed by the Fourth Amendment apply to arrest warrants, as well as to search warrants,[6] that they extend to the several states under the Fourteenth Amendment,[7] and that the determination of probable cause for the issuance of such warrants involves a determination of whether an offense had been committed, and if so, what reason there is to believe that the defendant committed it.[8]

(B) THE QUESTION OF PROBABLE CAUSE REQUIRED TO SUPPORT THE ISSUANCE OF AN ARREST WARRANT IS A JUDICIAL QUESTION

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[4] "The right of the people to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing * * * the persons * * * to be seized * * * "Fourth Amendment, U.S. Constitution.

[5] "The right of the people to be secure in their persons, * * * against unreasonable * * * seizures * * * shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing * * * the person or persons * * * to be seized * * *." Article I, Section 12, Florida Constitution, (1968).

[6] *Giordenello v. U.S.* (1958) 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed. 2d 1503; *Wong Sun v. U.S.* (1963) 371 U.S. 471, 83 S.Ct. 471, 9 L.Ed. 2d 441. See also *U.S. v. Melvin* (U.S.D.C., Fla., 1966) 258 F. Supp. 252.

[7] *Ker v. California* (1963) 374 U.S. 23, 30, 83 S.Ct. 1623, 10 L.Ed. 2d 726; *Aguilar v. Texas* (1964) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723.

[8] *Jaben v. U.S.* (1965) 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed. 2d 353; Rehearing Den. 382 U.S. 873, 86 S.Ct. 19, 15 L.Ed. 2d 114; *Johnson v. U.S.* (1948) 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; see also footnotes 6 and 7.

THAT MUST BE DETERMINED BY A JUDGE OR MAGISTRATE BEFORE A VALID WARRANT MAY ISSUE.

> The Supreme Court of the United States has held: "When the right of privacy must reasonably yield to the right of search, is, as a rule to be decided by a judicial officer, not by a policeman or government enforcement agent."[9]

The Florida Supreme Court has also held, in construing Section 22, Declaration of rights of the 1885 Florida Constitution which has been incorporated into Article I, Section 12 of the 1968 Florida Constitution:

> "The question of 'probable cause' for the issuance of a search warrant to invade the privacy of our dwelling or *person* is a judicial question that must be determined by a judge or magistrate before a valid warrant may issue."[10] (emphasis supplied)

Indeed, the lower court, prior to its decision in the instant case, had indicated that no one is authorized to make the decision to issue an arrest warrant except a judicial officer.[11]

In arriving at the decision appealed from, the District Court of Appeal held that the issuance of a warrant was merely "quasi-judicial" and not within the judicial power reserved to those courts enumerated in Article V, Section 1 of the 1968 Florida Constitution.

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[9] *Johnson v. U.S.* (1948) 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; quoted in *Camara v. Municipal Court* (1967) 387 U.S. 523, 87 S.Ct. 1727 at 1731, 18 L.Ed. 2d 930. See also *U.S. v. Melvin* (U.S.D.C., Fla., 1966) 258 Fed. Supp. 252.

[10] *Samuel v. State* (Fla., 1969) 222 So.2d 3 at 4; *Thurman v. State* (1934) 116 Fla. 426, 156 So. 484 at 488.

[11] *State v. Hickman* (Fla. App. 2, 1966) 189 So.2d 254, upholding a warrant in which the magistrate's signature and seal had been affixed by a member of his clerical staff because there was no showing that the magistrate did not make the actual decision to issue the warrant.

As authority for that proposition, the District Court of Appeal cited several cases, including the previous decision of this Court in *Florida Motor Lines v. Railroad Commissioners.*[12] However, an examination of that case reveals that this Court there relied on then Article V, Section 35 of the 1885 Florida Constitution as amended in 1910, which expressly authorized the Legislature to grant judicial powers to the Florida Railroad Commission. Thus, there was really no question of "quasi-judical powers" in that case, since the Constitution had, in fact, granted judicial powers to the Florida Railroad Commission.

The decision of the District Court of Appeal and the cases cited by it in support of its decision that the arrest warrant procedure is, at most, "quasi-judicial" and not a judicial function, fails to recognize the plain intent of our State and Federal Constitutions that the determination of probable cause required for the issuance of a valid arrest warrant must be made by a judicial officer.[13]

It is not every arrest and not every search that is proscribed by our State and Federal Constitutions. It is the "unreasonable" arrest that is prohibited, and as the Supreme Court indicated in *Camara,* "probable cause" is the standard by which a particular decision to arrest (seizure of person) is tested against the Constitutional mandate of reasonableness.[14]

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[12] (1930) 100 Fla. 538, 120 So. 876.

[13] See footnotes 9 and 10, supra. Indeed, the Alabama Court of Appeal has recognized this requirement in *Miller v. Birmingham,* (Ala., 1969) 218 So.2d 281, notwithstanding the 1909 decision of the Alabama Supreme Court in *Kruelhaus v. Birmingham,* 164 Ala. 623, 51 So. 297, relied on by the District Court of Appeal, as has the North Carolina Court in *State v. Matthews* (1967) 270 N.C. 35, 153 S.E.2d 791, and on that basis distinguishes its own prior decisions, relied on by the District Court of Appeal, in *State v. Furmage* (1959) 250 N.C. 616, 109 S.E.2d 563.

[14] *Camara v. Municipal Court* (1967) 387 U.S. 523, 87 S.Ct. 1727 1735, 18 L.Ed.2d 930.

Unquestionably, it may be more convenient for police officers to obtain arrest warrants from clerical employees of the City, and to thereby dispense with the necessity of technical accuracy and formality required in felonies and indictable crimes, but in the absence of some showing of a compelling need, there is no valid reason why jurisdiction over the person of a citizen charged with violation of a municipal ordinance cannot be obtained by service of summons. As stated by the Supreme Court of Minnesota:

> "It occurs to us that in initiating and prosecuting charges which are misdemeanors, the grave consequences to the accused, resulting from a wrongful arrest, far outweigh the potential harm to the community in requiring something more than the peremptory issuance of a warrant by a clerk untrained in the law. The harm to an accused arrested in his home or at his place of work, the humiliation and embarrassment to his family, and the fact he had a record of arrest, however unjust, are consequences difficult to measure."[15]

The governmental interest justifying the arrest must be balanced against the constitutionally protected liberty of the private citizen, and where grounds do not exist for arrest without a warrant, that balance can only be determined by one possessing the independent discretion of a judicial officer.[16]

(C) ARTICLE II, SECTION 3, AND ARTICLE V, SECTION 1 OF THE 1968 FLORIDA CONSTITUTION PROHIBIT THE DELEGATION OF JUDICIAL

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[15] *State v. Paulick* (1967) 277 Minn. 40, 151 N.W. 2d 591; see also *State v. Simpson* (1965) 28 Wis. 2d 590, 137 N.W. 2d 391; *Caulk v. Municipal Court* (Del., 1968) 243 A.2d 7071; *French v. Superior Court* (Ind., 1969) 247 N.E. 2d 510.

[16] *Camara v. Municipal Court*, footnote 14, supra.

POWERS TO A CLERK OF COURT, CITY CLERK OR OTHER MINISTERIAL OFFICER.[17]

It has been determined that the judicial powers of Florida's Municipal Courts spring from the same organic law which created our state courts, the two being a part of the same sovereign judicial system.[18]

The question is thus presented whether the Legislature may delegate the judicial function of determining probable cause for the issuance of arrest warrants to the City Clerk for the City of Tampa.[19]

In 1935, this Court held that an act of the Legislature purporting to empower the Clerk of the Circuit Court to cancel tax certificates which he determined were void for insufficiency of the legal description of the land described therein, was an unconstitutional delegation of judicial powers, because:

> "The Legislature cannot exercise judicial functions. If it cannot exercise judicial functions, certainly it is precluded from delegating the exercise of judicial functions to ministerial officers."[20]

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[17] Article II, Section 3, Florida Constitution, 1968, provides:
"The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."
Article V, Section 1, Florida Constitution, provides:
"The judicial power of the State of Florida is vested in a Supreme Court, District Courts of Appeal, Circuit Courts, Court of Record of Escambia County, Criminal Courts of Record, County Courts, County Judges Courts, Juvenile Courts, Courts of Justices of the Peace, and such other courts, including Municipal Courts or Commissions, as the Legislature may from time to time ordain and establish."

[18] *Waller v. Florida* (1970) 397 U.S. 387 90 S.Ct. 1184, 25 L.Ed. 2d 435,

[19] Either by general statute (Section 168.04, F.S.) or by Special Act (Section 495 of the Compiled Charter of the City of Tampa, enacted by Sec. 17, Ch. 5363, Laws of Fla., 1903, derived from Ch. 4883, Laws of Florida, 1889).

[20] *Otto v. Harllee* (1935) 119 Fla. 266, 161 So. 402.

This Court has also held that the City Recorder for the City of Jacksonville, acting as Clerk of the Municipal Court for that city, was a purely ministerial officer, amenable to mandamus, to perform his duties where he sought to act independently of the Municipal Court's judgment.[21] Being a ministerial officer, a clerk of court can hardly be said to possess that degree of independence or authority required to grant or refuse a request of law enforcement officers for arrest warrants. The decision of the District Court of Appeal that the arrest warrant procedure is, at most, "quasi-judicial", implies that decisions involving human liberty are less important and do not require the same constitutional safeguards as decisions involving property rights in tax certificates.

The District Court of Appeal relied heavily on the New Jersey case of *State v. Ruotolo*, (1968) 52 N.J. 508, 247 A.2d 1, to justify its holding that the arrest warrant procedure was merely "quasi-judicial" and, therefore, need not be performed by a judicial officer. The reasoning employed by that court was that nearly one-third of all United States Commissioners are not lawyers, yet are authorized to issue arrest warrants; that policemen may, under certain conditions, arrest without a warrant; that both grand juries and petit juries are composed of non-lawyers who apply rules of law in arriving at their decisions; and that, therefore, no harm could result from allowing a deputy clerk to issue an arrest warrant. The implication inherent in such reasoning is that a judicial officer must be one learned and trained in the law. This conclusion misses the thrust of the constitutional requirements of the warrant procedure.

While legal education and training may be desirable traits in a judicial officer, they are not essential, and are by no means the distinguishing feature by which the judicial branch of government is separated from any

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[21] *State v. Almand* (Fla., 1954) 75 So.2d 905.

other branch.[22] The distinguishing feature of the judicial branch of our government is the independence and discretion it enjoys in forming its judgments.[23]

Thus, while grand juries and petit juries are composed of non-lawyers who apply rules of law in arriving at their decisions, they are a part of the judicial branch of our government, whose judgments are independent of all other branches of government,[24] and such rules of law as they do apply are received in the form of legal advice from the State's attorney, in the case of grand juries[25] or instructions from the presiding judge, in the case of petit juries.[26]

Similarly, United States Commissioners (now known as United States Magistrates) are judicial officers who not only issue arrest warrants, but issue search warrants as well, conduct preliminary hearings, and have a limited trial jurisdiction. See 28 U.S.C. 636, 18 U.S.C. 3401 et seq., and the Federal Rules of Criminal Procedure. To pursue the argument that their functions are analogous to those of the City Clerk for the City of Tampa would sanction the legislative delegation to clerical personnel of power to issue search warrants, since the function of determining probable cause to issue search warrants is the same function performed in issuing arrest warrants.[27]

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[22] Article 5, Section 13, of the Florida Constitution, requires only that justices of the Supreme Court, judges of the District Courts of Appeal, Circuit Courts and Criminal Courts of Record to be members of the Florida Bar. It is debatable whether Section 13A actually repealed the requirement that judges of the Criminal Courts of Record be members of the Florida Bar. It is optional with the Legislature whether the judges of our other courts need to be lawyers.

[23] For this reason, judges are granted immunity from civil liability for damages resulting from their actions while acting within their jurisdiction. *McDaniel v. Harrell* (1921) 81 Fla. 66, 87 So. 631.

[24] *Ryon v. Shaw* (Fla., 1955) 77 So.2d 455; *Clemmons v. State* (Fla. App. 1, 1962) 141 So.2d 749.

[25] Sec. 905.19, Florida Statutes.

[26] Sec. 918.10 (1), Florida Statutes, RCP 1.470 (b).

[27] *Giordenello v. U.S.; Wong Sun v. U.S.* and *U.S. v. Melvin*, supra footnote 6.

Finally, although it is true that police officers may arrest citizens without a warrant under certain conditions, the very necessity for the issuance of an arrest warrant presupposes a situation where the evidence is not sufficiently persuasive or judicially competent to show that type of compelling governmental interest needed to outweigh the citizen's constitutionally-protected right to liberty in the absence of such a warrant. In such a situation, an arrest may be effected only where a judicial determination of that necessity has first been made.[28]

Since a clerk of court has no judicial powers under our constitution,[29] and the Legislature is prohibited from delegating such powers to him,[30] it follows that he is incapable of that kind of independent discretion necessary to refuse the issuance of a warrant when application is made in proper form, and that those provisions of the City of Tampa Charter[31] and Section 168.04, Florida Statutes, which purport to authorize the City Clerk for the City of Tampa to issue arrest warrants are an unconstitutional delegation of judicial powers.

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[28] *Aguilar v. Texas* (1964) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723.

[29] *Newport v. Culbreath* (1935) 120 Fla. 152, 161 So. 340.

[30] *Otto v. Harllee*, footnote 20, supra.

[31] City of Tampa Charter, Sec. 495 (Sec. 17, Ch. 5363, Law of Florida, 1903).

CONCLUSION

Both the Fourth Amendment to the United States Constitution and Article I, Section 12 of the 1968 Florida Constitution prohibit the issuance of an arrest warrant without a prior determination of probable cause which must be determined by a Judge or Magistrate, possessing independent discretion to balance the governmental need to effect an arrest against the constitutionally protected liberty of the individual, and Section 168.04, Florida Statutes, and the cited portion of the City of Tampa Charter which authorize that determination to be made by the City Clerk for the City of Tampa, as Clerk of that City's Municipal Court, are an unconstitutional delegation of judicial powers.

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IN THE SUPREME COURT OF FLORIDA

No. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

APPENDIX TO APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND APPELLATE DISTRICT
OF FLORIDA

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CERTIFICATE OF SERVICE

I DO CERTIFY that a true copy of the within Appendix to Appellant's Brief has been furnished to WM. REECE SMITH, JR., and GERALD H. BEE, Attorneys for the Appellee by mail this 30th day of November, 1970.

MALORY B. FRIER
Attorney for Appellant

APPENDIX

(R 57)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JULY TERM, A.D. 1970
Case No. 70-62

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 24, 1970.

HOBSON, CHIEF JUDGE

Appellant was charged in Tampa Municipal Court of careless driving while his ability to drive was impaired. He had been arrested under a warrant issued in the name of the city clerk of the City of Tampa, and signed by a deputy clerk. Appellant moved to quash the warrant in the Municipal Court on the grounds that the issuance of a warrant by a city clerk was the exercise of a judicial function by a non-judicial officer, and therefore a violation of the separation of powers under Fla. Const. Art. II, Section 3 (1968), and Fla. Const. Art. V, Section 1 (1968) which vests the judicial power in the courts of the state. Appellant's motion was denied, and he petitioned the Circuit Court of Hillsborough County for a writ of common law certiorari to review the denial of his motion to quash the warrant. The petition was denied by the Circuit Court, and the appellant appealed to the Supreme Court of Florida. The Supreme Court found the matter to be within the jurisdiction of this court and transferred the case here.[1]

[1] F.A.R. 2.1 (a) (5) (d):

Appellant contends that Fla. Stat. Section 168.04 (1967),[2] and Sections 495[3] and 160.1[4] of the charter of the City of Tampa are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest. These and like provisions have been dealt with before by Florida courts,[5] but the constitutionality of the procedure has not been raised in this state.

Appellant contends that the decision as to whether a warrant should issue is a judicial function and that because the legislature may not exercise judicial functions, it may not delegate judicial functions by statute to non-judicial officers. We disagree, and hold that the decision whether to issue a warrant is, at most, quasi-

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[2] FLA. STAT. SECTION 168.04 (1967): "CLERK AND MARSHALL MAY TAKE AFFIDAVITS AND ISSUE WARRANTS.

"The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against."

[3] LAWS OF FLA. 1903, Ch. 5363, Section 17:

"The chief of police, or any policeman of the city of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

[4] LAWS OF FLA. 1961, Ch. 61-2915, Section 1:

"The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court."

[5] *United States v. Melvin*, 258 F. Supp. 252 (S.D. Fla. 1966); *Headley v. State ex rel.* Bethune, 166 So.2d 479 (Fla. App. 3d 1964).

judicial and not within the "judicial power" reserved by the constitution to the judicial branch. *See generally* Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930). E. G. Kreulhaus v. City of Birmingham, 164 Ala. 623, 51 So. 297 (1909); State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968); State v. Thompson, 151 S.E.2d 870 (W.Va., 1966); *cf.* State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959). *Contra,* State v. Paulick, 277 Minn. 140, 151 N.W.2d 591 (1967).

State v. Paulick, supra, relied upon heavily by appellant, dealt with the very question before this court in the case sub judice. There, the Supreme Court of Minnesota held that a statute which vested authority to issue arrest warrants in clerks of municipal courts was unconstitutional as a violation of the separation of powers. Although the court's opinion is scholarly and appealing, we chose to folow the reasoning of the Supreme Court of New Jersey in State v. Ruototo, supra. The court stated at pages 3-5:

> "With regard to the issuance of a warrant, there is no doubt that if a determination of 'probable cause' is to have any meaning, it must be made by a neutral and detached court official who is immune from 'the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, 92 L.Ed. at 440."
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> * * * * *
>
> "A finding of neutrality, however, goes only part of the way to justify the challenged procedure. Before a deputy clerk is constitutionally permitted to determine whether the facts as alleged by the complainant constitute probable cause that an offense has been committed and that the defendant is the culprit, we must ask? Is the deputy clerk qualified to exercise the necessary judgment?"
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"(W)e believe that background in the law, although desirable, is not a requirement imposed by the Constitution on a determination of probable cause. After all, probable cause (sic) is a standard which is designed to be applied by laymen. A policeman may make an arrest without a warrant where there is probable cause, i.e., where there are facts which would lead 'a man of reasonable caution' to believe a crime has been or is being committed."

* * * * *

"Throughout the history of this country laymen have served in various judicial capacities, and particularly in order to determine the existence of probable cause. United States Commissioners, appointed by the United States District Courts, have been invested with the power to issue arrest warrants in federal prosecutions. Fed. Rules Crim. Procedure 3, 4. Today, almost one-third of the United States commissioners are laymen. See Staff Memorandum, Sub-committee on Improvements in Judicial Machinery; reported in Hearings, Senate Judiciary Committee, Federal Magistrates Act, 1967, p. 30. A grand jury, from which lawyers are routinely excluded, applies the standard of probable cause in determining whether to return an indictment. Grand jurors and petit jurors apply sundry rules of law to factual complexes; our jury system rests upon the premise that one need not be a lawyer to understand guiding principles and to make judgments in the light of them."

We feel that the emphasis should not be placed upon fine distinctions between judicial officers and non-judicial officers, but instead upon the requirement that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces

of law enforcement[6] and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public.

Appellant argues that the city, by allowing the clerk to issue arrest warrants, was providing nothing more than a "rubber stamp" for the police. If this were the case, it would be clearly unacceptable. However, there is nothing in the record to substantiate this allegation.

For the reasons stated, we hold the challenged statutes constitutional and the order appealed is

AFFIRMED.

LILES and McNULTY, JJ., CONCUR.

Chapter 24

POLICE DEPARTMENT*

Sec. 494. Powers of mayor 1903 Charter; organization of police force.

The duties of the mayor shall be to see that all the ordinances of the city council are faithfully executed, and he is authorized by and with the consent of the city council to organize and appoint such police force as shall be necessary to insure peace and good order of the city and the observance of law within the municipal limits. He shall have power to appoint by and with the consent of the city council, all officers of the city who are not made elective by this charter. He shall have the power to bid in all property for the city at any and all judicial sales, or sales under process of law, where the city is a party; to make pro tempore appointments to fill vacancies caused by death, sickness, absence or other

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[6] *E.g.* State v. Mathews, 270 N.C. 35, 153 S.E.2d 791 (1967); State ex rel. White v. Simson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965).

disability of any city officer, but he shall not have the power to fill vacancies in the members of the board of commissioners of public works or of the city council. (Ch. 4883, Laws of Florida 1899; Ch. 5363, § 7, Laws of Florida 1903).

Sec. 495. Arrest with and without warrant.

The chief of police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, where-upon said judge or clerk shall issue a warrant for the arrest of such person. (Ch. 4883, Laws of Florida 1889; Ch. 5363, § 17, Laws of Florida 1903)*

Sec. 159. City clerk—Election; term; clerk of board; ex-officio clerk of court; bond; compensation.

There shall be elected by the qualified electors of the City of Tampa a city clerk, who shall hold office for four years. He shall be the clerk of the board of representatives*, and shall act as ex-officio clerk of the municipal court. The clerk shall give such bond as the board of representatives* may fix, and shall perform all the duties now or hereafter imposed upon him by law or ordinance not inconsistent with the provisions of this revised charter. The city clerk shall be paid as compensation for his services the sum of $3,600.00 per year, payable in monthly installments. (Rev. Char., § 22, 1927)

Editor's note—The salary of the city clerk was $6000 as fixed by § 160 (see § 160.01).

*Cross references—For the creation of a police department, see § 142; for the designation of the duties of the police department and the chief of police, see § 143; for the designation of the duties of the chief of police, see § 153.

Sec. 160. Same—Salary, 1957.

That beginning October 1, 1957, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa, shall be six thousand dollars ($6,000.00) per annum, payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts Ch. 57-1908, § 1)

Editor's note—The salary of the clerk as established in the year 1949 is contained in § 161 and § 393.

Sec. 160.01. Same—Salary, 1965.

Beginning October 1, 1965, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa shall be seven thousand five hundred dollars ($7,500.00) per annum, payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts, Ch. 65-2301, § 1)

Editor's note—Sec. Sec. 160.01, derived from Ch. 65-2301, § 1, as included herein supersedes the provisions regarding the city clerk's salary contained in previous enactments, as compiled in §§ 159, 160, 161, and 393.

*Editor's note—Sec. 41.1 changed the designation of the governing body to city council.

Sec. 160.02. Same—Salary, 1969.

The salary of the clerk in all cities having a population in excess of two hundred thousand (200,000) in all counties having a population of not less than three hundred ninety thousand (390,000) nor more than four hundred fifty thousand (450,000) according to the latest official decennial census is fixed and prescribed at the sum of nine thousand [dollars] ($9,000.00) per annum, payable in equal monthly installments. (Gen. Laws, Ch. 69-690, § 2)

Editor's note—Sec. 160.02, derived from Ch. 69-690, § 2, as included herein, supersedes §§ 159, 160, 160.01, 161 and 393 pertaining to the salary of the city clerk.

Sec. 160.1. Same—Appointment of deputies; powers.

The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy of deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court. (Sp. Acts, Ch. 61-2915, § 1)

Cross reference—Sec. 415 empowers the city to make provision for a clerk of the municipal court.

Sec. 161. Salaries of mayor, clerk and attorney.

That beginning October 1, 1949, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of each of the officers of the City of Tampa, Florida, hereinafter enumerated shall be in the following amounts per annum:

Mayor	$10,000.00

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE No. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

APPELLANT'S REPLY BRIEF

STATEMENT OF THE CASE.

The parties will be referred to in this reply brief as they were in the Appellant's main brief, that is "Appellant" and "Appellee". The Appellant submits that the Statement of the Case and the Facts of this Case were sufficiently stated in his main brief and requires nothing further in this regard.

STATEMENT OF POINTS

I REPLY TO APPELLEE'S FIRST POINT THE ARREST WARRANT PROCEDURE IS A STRICTLY JUDICIAL FUNCTION WHICH BECAUSE OF ITS ESSENTIAL NATURE REQUIRING A DETERMINATION OF PROBABLE CAUSE NECESSARY TO THE ASSUMPTION OF JURISDICTION BY THE COURT ISSUING THE SAME AND POSSESSING THE ATTRIBUTE OF AUTHORIZING SEARCHES AND SEIZURES INCIDENT THERETO, MAY NOT BE DELEGATED BY SPECIAL OR GENERAL LAW TO A CLERK OF COURT AS A QUASI-JUDICIAL FUNCTION UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARICLE I, SECTION 12, ARTICLE II, SECTION 3 AND ARTICLE V, SECTION 1 OF THE FLORIDA CONSTITUTION.

II REPLY TO APPELLEE'S SECOND POINT THE TERM "MAGISTRATES" AS USED BY THE UNITED STATES SUPREME COURT INTERPRETING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO REQUIRE THAT ARREST AND SEARCH WARRANTS BE ISSUED BY "NEUTRAL AND DETACHED MAGISTRATES" IS NOT SYNONYMOUS WITH THE TERM "MAGISTRATE" AS USED IN THE FEDERAL EXTRADITION STATUTE, REQUIRING THAT REQUISITIONS IN EXTRADITION PROCEEDINGS BE SUPPORTED BY "INFORMATION FOUND OR AFFIDAVIT MADE BEFORE A MAGISTRATE."

ARGUMENT

I REPLY TO APPELLEE'S FIRST POINT THE ARREST WARRANT PROCEDURE IS A STRICTLY JUDICIAL FUNCTION WHICH BECAUSE OF ITS ESSENTIAL NATURE REQUIRING A DETERMINATION OF PROBABLE CAUSE NECESSARY TO THE ASSUMPTION OF JURISDICTION BY THE COURT ISSUING THE SAME AND POSSESSING THE ATTRIBUTE OF AUTHORIZING SEARCHES AND SEIZURES INCIDENT THERETO, MAY NOT BE DELEGATED BY SPECIAL OR GENERAL LAW TO A CLERK OF COURT AS A QUASI-JUDICIAL FUNCTION UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARICLE I, SECTION 12, ARTICLE II, SECTION 3 AND ARTICLE V, SECTION 1 OF THE FLORIDA CONSTITUTION.

Appellee's first point (and the District Court's decision) asserts that special and general laws authori-

zing Clerks of Municipal Courts to issue arrest warrants do not violate Constitutional prohibitions against delegation of judicial powers because the arrest warrant procedure, including the making of decisions as to the existence of probable cause, is merely "quasi-judicial". This seems to infer that Municipal Courts are not Courts of law because the phrase "quasi-judicial" is employed to describe activities which, although judicial in nature, "occurs other than in a Court of law."[1]

Thus, "quasi-judicial" functions of government may be conferred upon and exercised or performed by permissible administrative agencies when direct or immediate or continuing judicial action is inxepedient or impracticable, and do not involve any essential judicial powers.[2]

Although the decisions of Lower Courts, as well as those of quasi-judicial bodies may both be reviewed by Certiorari, the scope of review in the case of quasi-judicial bodies is considerably broader than that afforded to decisions of Lower Courts,[3] and, on at least one occasion, mandamus was held to be the proper remedy to review a quasi-judicial decision,[4] although it is elementary that a strictly judicial decision is not subject to review by mandamus.[5]

Although the Appellee (and the District Court of Appeal) cite *Florida Motor Lines vs. Railroad Commossioners*[6] as authority for the proposition that quasi-ju-

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[1] *Modlin vs. City of Miami Beach,* (Fla. 1967) 201 So.2d 70, 74.

[2] *McRae vs. Robbins,* 151 Fla. 109, 9 So.2d 284, 390 (1942).

[3] *Wilson vs. McCoy Mfg. Co.,* (Fla. 1954) 69 So.2d 659.

[4] *Nelson vs. Lindsey,* 151 Fla. 596, 10 So.2d 1313 (1942).

[5] *State ex rel Kaufman vs. Sutton,* Fla. App. 3, 1970) 231 So.2d 874; *United States vs. Lawrence,* 3 Dall. 42, 3 U.S. 42, 1 L.Ed. 502 (1795).

[6] *Florida Motor Lines vs. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930).

dicial functions do not embrace strictly judicial activities which are restricted to the Courts enumerated in the judicial article of our Constitution, both the Appellee and the District Court of Appeal overlooked or failed to consider the limitations imposed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the 1968 Florida Constitution on the types o judicial activities which may be designated as "quasi-judicial" as distinguished from those which are strictly judicial. As this Court stated in that case:

> "Whether a function is judicial or quasi-judicial must be determined from its essential nature and attributes and the law applicable thereto."[7]

Thus, the administrative procedures of the Florida Railroad Commissioners for deciding whther to grant, modify or deny certificates of ppublic convenience and necessity to common carriers was held in that case to not constitute a function which from its essential nature and attributes could only be performed by a Court.

It is thus necessary to examine the essential nature and attributes of the arrest warrant procedure to determine whether, from the law, it is such a function which need not be performed by a Court.

First, it must be borne in mind that an arrest warrant is, in effect, an authorization to search since every lawful arrest authorizes, as an incident thereto, a search of the person arrested and "the area within which he might gain possession of a weapon or destructible evidence."[8] Thus one attribute of the arrest warrant pro-

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[7] Ibid at 129 So. 882.

[8] *Chimel vs. California*, 395 U.S. 752, 89 So.Ct. 2034, 23 L.Ed. 2d 685 (1969); c.f. *State vs. O'Steen*, (Fla. App.; 1970) 238 So.2d 434; and cases cited therein.

cedure, is the incidental search which the arrest entails, which, although restricted as to the area to be searched, is broader in the respect that no specific location or items to be searched for must be enumerated in the affidavit or warrant.

Appellee also cites *State ex rel Melson vs. Peeler*[9] and *Ocampo vs. United States*[10] to support its argument that determinations of probable cause are not exclusively judicial functions whose exercise must be restricted to the Courts. Neither of these cases however, dealt with the Constitutional limitations on arrest contained in the Fourth and Fourteenth Amendments to the United States Constitution or Article I, Section 12 of the Florida Constitution. *Ocampo* did hold that certain provisions contained in the Manila Charter authorizing the prosecuting attorney to conduct preliminary investigations and file information for prosecution under the criminal laws of the Phillippine Islands did not violate the Phillipine Bill of Rights but it should be pointed out that the informations were required to be sworn to before the Judge of the Court of First Instance who thereupon issued the arrest warrant. Although the Court's opinion did not make it clear whether the Judge of the Court of First Instance held any discretion to refuse to issue the arrest warrant it does appear that the act in question reserved to the Court of First Instance the ower to "make such summary investigation into the case as it may deem ncessary to enable it to fix bail or determine whether the offense is bailable" and it should not be presumed that the Judge's action in issuing the arrest warrant was ministerial.[11]

Melson merely held that the limitation of prosecution statute in Florida was tolled by the filing of an information in the Court having jurisdiction of the of-

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[9] *State ex rel Melson vs. Peeler,* 107 Fla. 615, 146 So. 188 (1933).

[10] *Ocampo vs. United States,* 234 U.S. 91, 34 S.Ct. 712, 582, L.Ed. 1231 (1913).

[11] *United States vs. Lawrence,* 3 Dall. 42, 3 U.S. 42, 1 L.Ed.

fense charged and since that act constituted the institution of a criminal prosecution the issuance of a capias thereon by the Clerk of the Court was purely a ministerial act, the validity of which was not questioned. Although *Melson* is clearly inapplicable it is believed that Appellee intended to assert that case for the principle stated in *Hall vs. State*[12] where the Court referred the duties of a State Attorney requiring an examination of evidence and the determination of questions of law and fact before taking action thereon by filing an information as being "quasi-judicial" or discretionary in character. However the Court there recognized that the power of a State Attorney to perform such functions was expressly sanctioned by our Constitution.[13] The act performed by a prosecuting attorney in filing an information charging the commission of a criminal offense with the Court having jurisdiction over that offense serves the same purpose as that of a magistrate in determining probable cause for the issuancce of an arrest warrant since both activities confer jurisdiction upon the Courts.[14] Whereas jurisdiction may be conferred upon a Court in a particular criminal prosecution where the prosecuting attorney for the Court filed an information therein, the determination of probable cause is necessary to the existence of the magistrate's jurisdiction to issue the arrest warrant. Thus, the assumption of jurisdiction is a second attribute of the arrest warrant procedure, the essential nature of which is strictly judicial and may not be exercised by or delegated to Clerks of Court.[15]

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[12] *Hall vs. State*, 136 Fla. 644, 187 So. 392 (1939).

[13] Article I, Section 15, Florida Constitution of 1968 formerly Section 10, Declaration of Rights, 1885 Florida Constitution.

[14] *Sullivan vs. State* (Fla. 1951) 49 So.2d 794.

[15] *Newport vs. Culbreath*, 120 Fla. 152, 161 So. 340 (1935); *Otto vs. Harllee*, 119 Fla. 266, 161 So. 402 (1935).

II REPLY TO APPELLEE'S SECOND POINT

THE TERM "MAGISTRATE" AS USED BY THE UNITED STATES SUPREME COURT INTERPRETING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO REQUIRE THAT ARREST AND SEARCH WARRANTS BE ISSUED BY "NEUTRAL AND DETACHED MAGISTRATES" IS NOT SYNONYMOUS WITH THE TERM "MAGISTRATES", AS USED IN THE FEDERAL EXTRADITION STATUTE, REQUIRING THAT REQUISITIONS IN EXTRADITION PROCEEDINGS BE SUPPORTED BY "INFORMATION FOUND OR AFFIDAVIT MADE BEFORE A MAGISTRATE."

Appellee also asserts that a Clerk of the Municipal Court is a neutral and detached "magistrate" within the intendment of certain United States Supreme Court decisions requiring that determinations of probable cause for the issuance of arrest warrants be made by a neutral and detached magistrate under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution, because that Court and this Court have both upheld interstate extradition proceedings under a Federal Statute requiring the requisition of the demanding state to be supported by "an indictment found or an affidavit made before a magistrate" of the demanding state, charging the commission of a crime by the person sought to be extradited where the requisition was supported by affidavits executed before a Georgia notary public[16] and a deputy clerk of the City of Rochester, New York.[17]

However, an examination of those decisions reveals

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[16] *Compton vs. Alabama*, 214 U.S. 1, 29 S.Ct. 605, 53 L.Ed. 885 (1909).

[17] *State ex rel Miller vs. McLeod*, 142 Fla. 254, 194 So. 628 (1940).

that the constitutional question raised in this proceeding were neither raised nor decided in those cases, the sole question in each case being the proper construction and application of the federal extradition statute.

In the latter case (*State ex rel vs. McLeod*),[18] the Florida Supreme Court quoted the New York statute which authorized the Clerk to "take information upon which warrants for the arrest of persons charged with the commission of a crime or the violation of an ordinance, *may be issued by the City Judges* * * * * *" (emphasis supplied) The Court then noted:

> "It is important to note at this point that on the same day the affidavit was made before the deputy clerk of the City of Rochester, Criminal Branch, Plaintiff in error had committed an offense, the Judge of said Court signed a warrant for the arrest of Plaintiff in error tested in the name of the 'People of the State of New York' addressed to any 'Peace Officer in the State of New York' and, reciting that 'Information upon oath had been laid before him of the crime' and accusing Charles E. Miller (Plaintiff in error) thereof'."[19]

Thus, for purposes of construing and applying the federal extradition statute, that decision held, in efffect, that the mere ministerial act of administering the oath to an affidavit for an arrest warrant was all that was required by the federal statute, there being no requirement in the statute that the magistrate decide any questions of law or fact before performing the act.

In *Compton vs. Alabama*,[20] on the other hand, the Supreme Court of the United States pointed out that under Georgia law in effect at that time, notaries public were "ex-officio justices of the peace" who were re-

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[18]See note 17 supra.

[19]At 194 So. 630.

[20]See note 16 supra.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 40,156

GERALD SHADWICK,
Appellant,
vs.
CITY OF TAMPA,
Appellee.

APPELLEE'S BRIEF

STATEMENT OF THE CASE

This is an appeal from a Final Judgment from the District Court of Appeal, Second District, reported as Shadwick v. City of Tampa, 237 So.2d 231 (2d D.C.A., Fla., 1970). The Appellant was the Appellant below and Appellee was Appellee. In this brief the parties will be referred to as they stand in this Court, Appellant and Appellee, respectively.

The following symbols will be used:

"R" for Record-on-Appeal
"A" for Appendix of Appellee.

The cause was commenced when the Appellant was arrested and charged with "careless driving while drinking" on March 6, 1969, in the City of Tampa, Hillsborough County, Florida, in violation of Section 36-89 (b), City of Tampa Code (R-1 thru 5). The Appellant filed his Motion to Quash Warrant on March 13, 1969, in the Municipal Court of the City of Tampa (R-6 and 7) and subsequently, on April 18, 1969, an Order was entered denying said Motion (R-8). Appellant on April 23, 1969, filed Petition for Writ of Certiorari in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, (R-1 thru 3) and on

July 23, 1969, the Honorable Neil C. McMullen, Circuit Judge, entered an Order Denying Writ of Certiorari (R-9).

From this Order (R-9), Appellant on August 21, 1969, timely filed his Notice of Appeal (R-10) to the Supreme Court of Florida which found the matter to be within the jurisdiction of the District Court of Appeal, Second District, and transferred the case there.

Subsequently, after oral argument the Second District Court of Appeal filed its Opinion on June 24, 1970, holding the challenged statutes constitutional and affirming the Order on appeal (R-57 thru 61).

After entry of an Order Denying Re-Hearing (R-66), Appelant on August 24, 1970, timey filed his Notice of Appeal in this Court invoking its jurisdiction under Article 5, Section 4 (2), Florida Constitution (1968).

The challenged decision of the Second District of Appeal (R-57 thru 61) is made a part of this Brief in the Appendix attached hereto (A-5).

POINTS INVOLVED

I. THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS ARE CONSTITUTIONAL DELEGATION OF A QUASI-JUDICIAL POWER WHICH IMPLIES THE POWER TO DETERMINE PROBABLE CAUSE. Art. 1, Sec. 12; Art. 2, Sec. 3; Art. 3, Sec. 11(a)(1); Art. 5, Sec. 1, Fla. Const. (1968); 4th and 14th Amend., U.S. Const. (raised by Appellant's Assignment of Errors No. 1 and 2 (R-67), and Appellant's Brief, Points 1(A)(B) and (C)).

II. THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE A CLERK OR DEPUTY CLERK OF THE MUNICIPAL COURT OF THE CITY OF TAMPA IS A NEUTRAL AND DETACHED "MAGISTRATE" WITHIN THE REQUIREMENTS OF THE 4TH AND 14TH AMEND., U.S. CONST., AND ART. 1, SEC. 12, FLA. CONST., BY VIRTUE OF THE FLORIDA LAWS FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS. Fla. Stat. Sec. 168.04(1967) and Secs. 495, 160.1, and 5(d), Charter of the City of Tampa (A-1 thru 4), (raised by Appelant's Brief, Points I(a)(b) and (c).)

STATEMENT OF THE FACTS

Due to the nature of the points involved, there are no factual matters requiring determination on this Appeal.

ARGUMENT

POINT I

THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS ARE CONSTITUTIONAL DELEGATION OF A QUASI-JUDICIAL POWER WHICH IMPLIES THE POWER TO DETERMINE PROBABL CAUSE. Art. 1, Sec. 12; Art. 2, Sec. 3; Art. 3, Sec. 11(a)(1); Art. 5, Sec. 1, Fla. Const. (1968); 4th and 14th Amend., U.S. Const. (Raised by Appellant's Assignment of Errors No. 1 and 2 (R-67), and Appellant's Brief, Points 1(A)(B) and (C).)

The points raised in Appellant's Brief are not in harmony with the issues raised and decided in the decis-

ion on Appeal (R-57 thru 61). Briefly summarizing that decision, the Court held that Fla. Stat. Sec. 168.04 (1967), and Secs. 495 and 160.1 of the Charter of the City of Tampa are constitutional ". . . in so far as they purport to vest in the City Clerk the power to issue Arrest Warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest." (R-58). The lower Court further held that ". . . the decision whether to issue a Warrant is, at most, quasi-judicial and not within the 'judicial power' reserved by the Constitution to the judicial branch." (R-59).

Any implication in Appellant's Brief that the lower Court has departed from the numerous federal constitutional requirements cited by the Appellant, or that the lower Court ignored the issue of "probable cause" is quickly dispelled by the requirement ". . . that the person who issues the Warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a Warrant." (R-61).

The Constitution of the State of Florida provides that special laws or general laws of local application may be passed by the Legislature pertaining to duties of municipal officers. Article III, Sec. 11(a)(1), Fla. Const. (1968). This power of the Legislature to pass laws fixing the duties of municipal officers is not substantially changed from that which existed under Art. 3, Sec. 20, Fla. Const. (1885).

By virtue of this constitutional power, the Legislature enacted the following special laws pertaining to the duties of Clerks and Deputy Clerks of the Municipal Court in the City of Tampa and incorporated in the Charter of the City of Tampa, Sec. 495 and Sec. 160.1.

"Sec. 495—Arrest with and without Warrant.

The Chief of Police, or any policeman of the City of Tampa may arrest, without warrant, any person violating any of the ordinances of said City,

committed in the presence of such officer, and when knowledge of the violation of any ordinance of said City shall come to said Chief of Police or policeman, not committed in his presence, he shall, at once make affidavit, before the Judge or *Clerk of the Municipal Court,* against the person charged with such violation, whereupon said Judge or *Clerk shall issue a Warrant for the arrest of such person.*" Laws of Fla. 1903, Ch. 5363, Sec. 17 (A-1). Emphasis supplied.

"Sec. 160.1—Same, Appointment of Deputies; Powers.

The City Clerk of the City of Tampa, with the approval of the Mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the City Civil Service, *and to have and exercise the same powers as the City Clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as Clerks of the Municipal Courts.*" Laws of Fla., 1961, Ch. 61-2915, Sec. 1(A-2 and 3). Emphasis supplied.

The aforementioned powers of the Clerk of the Municipal Court, or his deputies, are not incompatible or in conflict with the general laws of the State of Florida. Fla. Stat. Sec. 168.04 (1967); *Headley v. State,* 166 So.2d 479 (3rd D.C.A. Fla. 1964). In fact, it is the duty of the officers of the City of Tampa to exercise the powers granted to them by virtue of the general laws of the State of Florida. Sec. 5(d), Ch. of the City of Tampa (A-4).

The Appellant is apparently concerned that the Clerk or Deputy Clerk of the Municipal Court is not a judicial officer such as could perform the duties of determining probable cause or act as a neutral and detatched magistrate in the exercise of a judicial discretion to determine the existence of probable cause. However, the function of determining whether probable

cause exists for an arrest is only quasi-judicial and need not be confined to strictly judicial officers. *State v. Furmage,* 109 SE2d 563, 570 (Sup. Ct. N.C., 1959); *Ocampo v. U. S.,* 243 U.S. 91, 58 L. Ed. 1231, 34 S. Ct. 712.

After discussing the various powers of a Solicitor and the fact that the Legislature may grant quasi-judicial powers, the Court in *State v. Furmage,* supra, quoted from *Ocampo v. U.S.,* supra, as follows:

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function . . . as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, and only entitled the accused to his liberty for the present, leaving him subject to re-arrest. . . . *In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal.*" Id. 109 S.E.2d 570, emphasis supplied.

Although the case of *State v. Furmage,* supra, involved the powers of a Solicitor, the Court recognized that the Legislature may pass laws authorizing Clerks to issue arrest warrants even though this function may be judicial or quasi-judicial because such a determination is in no sense a final adjudication. Id. 109 S.E.2d 570.

The power to issue warrants of arrest necessarily implies the power to hear and determine the issue of probable cause. Id. 109 S. E.2d at page 566.

A statute which confers the powers to issue arrest warrants by a Clerk or Deputy Clerk of a Municipal Court is not an unconstitutional exercise or delegation

of "judicial power" and conforms to the requirement of the 4th and 14th Amendment to the Constitution of the United States. See generally *Florida Motor Lines v. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930). *E.g. Kreulhaus v. City of Birmingham,* 164 Ala. 623, 51 So. 297 (1909); *State v. Ruotolo,* 52 N.J. 508, 247 A.2d 1 (1968); *State v. Thompson,* 151 S.E.2d 870 (W.Va. 1966); *c f. State v. Furmage,* 250 N.C. 616, 109 S.E.2d 563 (1959). *Contra, State v. Paulick,* 277 Minn. 140, 151 N.W.2d 591 (1967).

Furthermore, such statutes are not an unconstitutional delegation of judicial power because it was certainly not the intent of framers of our Constitution to deny the Legislature this specific grant of power. This specific grant of power to the Legislature to pass these special laws (A-1, 2 and 3) is conferred by Art. 3, Sec. 11 (a) (1), Fla. Const. 1968) as formerly contained in Art. 3, Sec. 20 Fla. Const. (1885). The delegation by the Legislature of this quasi-judicial power to the Clerk and Deputy Clerks of the Municipal Court of the City of Tampa does not impose upon the "judicial power" of the State of Florida vested in the various courts enumerated in Art. 5, Sec. 1, Fla. Const. (1968) or violate the "separation of powers clause" under Art. 2, Sec. 3, Fla. Const. (1968). Where a statute confers quasi-judicial duty it is not an illegal delegation of "judicial powers" or violate the "separation of powers clause". *Florida Motor Lines v. Railroad Commissioners,* supra; *Nelson v. Lindsey,* 151 Fla. 596, 10 So.2d 131, 134 (Sup. Ct. Fla. 1942).

The general law on the issue before the Court is as follows:

> "When so provided by statute, the authority to issue warrants may be vested in officers whose other duties are purely ministerial, such as *clerks,* . . ." Emphasis supplied; 22 C.J.S., Sec. 318, at page 820-821; *State ex. rel. Melson v. Peeler,* 107 Fla. 615, 146 So. 188 (Sup. Ct. Fla. 1933). Also see, 22 C.J.S. Sec. 318, 1970 Supp. Citing *Miller v. U.S.* 354 F.2d 801 (8 C.C.A. Mo. 1966).

"A Clerk of Court may not exercise judicial power except by constitutional or legislative provision, and then only in accordance with strict language of the provision." *15 Am. Jur.2d,* Clerks of Court, Sec. 22.

"Certain acts, although partially judicial in nature, may be performed by the Clerk of the Court. A familiar example is the power *to issue warrants of arrest."* Emphasis supplied. *15 Am. Jur.2d,* Clerks of Court, Sec. 22.

In conclusion, the Appellee adopts, as part of this Brief, the decision on appeal (R-57 thru 61) as officially reported in the case of *Shadwick v. City of Tampa,* 237 So.2d 231 (2d D.C.A. Fla. 1970) and, further, respectfully shows the Court that the Constitution of the State of Florida provides that special laws or general laws of local application, such as are here involved, may be passed by the Legislature pertaining to the duties of municipal officers. The Legislature by these laws has provided that the Clerk or Deputy Clerk of the Municipal Court shall issue arrest warrants in the City of Tampa (A-1, 2 and 3) . The power to issue warrants of arrest implies the power to determine probable cause. In the exercise of this quasi-judicial duty or power, the Deputy Clerk of the Municipal Court properly issued an arrest warrant (R-5) after obtaining a Complaint-Affidavit from the police officer (R-4).

The Clerk and Deputy Clerks of the Municipal Court of the City of Tampa are not police officers exercising a dual function of active law enforcement on the street and also issuing arrest warrants upon probable cause. They are appointed officers under the City Clerk of the City of Tampa vested with the powers of the City Clerk (A-2, 3).

WHEREFORE, Appellee prays this Court to affirm and adopt the decision on appeal (R-57 thru 61).

ARGUMENT

POINT II

THE DECISION ON APPEAL (R-57 thru 61) SHOULD BE AFFIRMED AND ADOPTED BECAUSE A CLERK OR DEPUTY CLERK OF THE MUNICIPAL COURT OF THE CITY OF TAMPA IS A NEUTRAL AND DETACHED "MAGISTRATE" WITHIN THE REQUIREMENTS OF THE 4TH AND 14TH AMEND., U. S. CONSTITUTION AND ART. 1, SEC. 12, FLA. CONSTITUTION, BY VIRTUE OF THE FLORIDA LAWS FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS. Fla. Stat. Sec. 168.04 (1967) and Secs. 495, 160.1, and 5(d), Charter of the City of Tampa (A-1 thru 4). (raised by Appellant's Brief, Points I(a) (b) and (c).)

The Appellant raised a vexing question, unexplained, whether in the realm of a constitutional warrant procedure, can a Clerk or Deputy Clerk of a Municipal Court be a "magistrate."

There is no question that a constitutional warrant procedure requires that inferences from facts which lead to the Complaint ". . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. U.S.*, 357 U.S. 480, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958); *Johnson v. U.S.*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948); *U.S. v. Lefkowicz*, 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877, 82 A.L.R. 775; *U.S. v. Kirschenblatt*, 16 F.2d 202, 203, 51 A.L.R. 416 (2d C.C.A. 1926); 4th and 14th Amend., U.S. Const.; Art. 1, Sec. 12, Fla. Const., (1968).

The Supreme Court of the United States has given the word "magistrate" a broad meaning. In a general sense a magistrate is a public civil officer, possessing

such power, legislative, executive, or judicial, as the government appointing him may ordain; though in a narrow sense he is regarded as an inferior judicial officer. 9 A, *U. S. Supreme Court Digest, Lawyers Addition,* Justice of the Peace, Sec. 1 at page 184 (1970 Edition); *J. D. Compton v. State of Alabama,* 214 U.S. 1, 29 S.Ct. 605, 607, 53 L.Ed. 885 (1909), where a notary public was held to be a "magistrate" to issue an extradition warrant by a Governor.

Mr. Justice Storey said: "I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer." *Compton v. State of Alabama,* supra, at page 607.

In the federal system, Clerks of Municipal Court clothed with authority under State Statutes to issue arrest warrants are considered to be "magistrates." See generally, *State v. Ruotolo,* 52 N.J. 508, 247 A.2d 1, 5 (1968) footnote No. 4, citing *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630 (Sup. Ct. Fla. 1940).

Other definitions of a "magistrate" are contained in the following:

> "A person clothed with power as a public civil officer; a public civil officer invested with executive or judicial powers; . . ." *Webster's New International Dictionary, Second Edition,* unabridged.

> "A Federal Law requiring an Affidavit to be sworn to before a magistrate, is complied with when 'sworn to before me, J.M., Clerk of the Municipal Court,' it being presumed that it was taken in the Court; *In re Keller,* 36 Fed. 684; as used in U.S.R.S., Sec. 5278 (extradition proceedings); it includes an assistant police magistrate of a City; *Kurtz v. State,* 22 Fla. 36 1 Am. St. Rep. 173." *Volume 2 Bouvier's Law Dictionary,* 3rd Edition (1914).

quired to "keep separate dockets of all civil and criminal cases disposed of by them."

These decisions and others, involving application of the federal extradition statute, must be read in light of the earlier pronouncement of the United States Supreme Court in *United States vs. Lawrence*[21] where that Court refused to mandamus a United States District Judge to issue an arrest warrant because his actions were performed in a judicial capacity when he determined that the evidence was not sufficient to authorize the issuance of the warrant.

To say that a Municipal Court Clerk or deputy clerk is a magistrate possessed of discretionary powers in the arrest warrant procedure because he may be deemed a magistrate having the ministerial duties of administering oaths in connection with the issuance of such a warrant by one who is possessed of such discretionary powers, is to ignore the principle stated in *Florida Motor Lines vs. Railroad Commissioners,*[22] cited by both the Appellee and the District Court of Appeal, that it is the nature of the act to be performed, rather than the name of the official who performed it, that determines whether the act is judicial or otherwise.

CONCLUSION

The Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the 1968 Florida Constitution, require that before an arrest warrant may issue, a determination be made that probable cause exists to believe the accused person has committed a specific crime. This determination involves questions of law and fact, the resolution of which permits drawing inferences from evidence which is judi-

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[21] *United States vs. Lawrence,* 3 Dall. 42, 3 U.S. 42, 1 L.Ed. 502 (1795).

[22] *Florida Motor Lines vs. Railroad Commissioners,* 100 Fla. 538, 129 So. 876 (1930).

cially less competent than that required to sanction an arrest without a warrant, and must therefore be made by a neutral and detached magistrate in the exercise of discretionary or judicial power as opposed to the performance of purely ministerial or executive duties. The existance of probable cause is necessary to the assumption of jurisdiction by the Court issuing the warrant so that one attribute of the determination of its existence, is a determination of the Court's jurisdiction. Another attribute of the arrest warrant procedure is the search and seizure incident to the execution of the warrant by arrest.

The essential nature of both attributes require that the decision making function (the determination of probable cause) be performed by an officer possessed of strictly judicial power and preclude its exercise by, or delegation to, a quasi-judicial officer, much less a ministerial officer. Accordingly, both special and general laws purporting to vest these powers in a clerk or deputy clerk of the Municipal Court are unconstitutional delegations of judicial power under the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 12 of the Florida Constitution, and the separation of power clause (Article II, Section 3) and Article V, Section 1 of the Florida Constitution vesting the judicial power of the state in certain Courts.

MALORY B. FRIER
Attorney for Appellant
1809 North Howard Avenue
Tampa, Florida 33607

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing APPELLANT'S REPLY BRIEF has been furnished, by U. S. Mail, to Gerald H. Bee, Esquire, 725 E. Kennedy Boulevard, Tampa; Florida 33601 and Wm. Reece Smith, Jr., P. O. Box 3239, Tampa, Florida 33601, Attorneys for Appellee, this 22nd day of January, 1971.

MALORY B. FRIER
Attorney for Appellant

"Person clothed with power as a public civil officer. *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630." *Black's Law Dictionary,* 4th Edition (1957).

The Supreme Court of Florida, following the Supreme Court of the United States in *Compton v. State of Alabama,* supra, has given the word "magistrate" a broad meaning and has held a Deputy Clerk to be a magistrate within the meaning of a Federal Extradition Act by virtue of the powers vested in said Clerk under the laws of the State of New York. *State ex rel Miller v. McLeod,* 142 Fla. 254, 194 So. 628, 630 (Sup. Ct. Fla. 1940).

In conclusion, Appellee respectfully shows the Court that the definition of the word "magistrate" as applied in the case law in the Florida and the Federal systems to determine the constitutionality of a warrant system is given a broad meaning. The Clerk and Deputy Clerks of the Municipal Court of the City of Tampa are neutral and detached "magistrates", unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the 4th and 14th Amend., U. S. Const., and Art. 1, Sec. 12, Fla. Const. (1968), by virtue of the Florida Laws fixing their powers and duties to issue arrest warrants. The lower court in its decision on appeal did not depart from these guiding principles and set forth the correct standard for a constitutional warrant procedure. (R-60, 61).

WHEREFORE, Appellee prays this Court to affirm and adopt the decision on appeal (R-57 thru 61).

Respectfully submitted,

WM. REECE SMITH, JR.
CITY ATTORNEY
By: GERALD H. BEE
Assistant City Attorney
725 E. Kennedy Boulevard
Tampa, Florida 33602
ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellee's Brief has been furnished, by U. S. Mail, to Malory B. Frier, Esquire, 1809 North Howard Avenue, Tampa, Florida 33607, Attorney for Appellant, this 16th day of December, 1970.

GERALD H. BEE

Chapter 24

POLICE DEPARTMENT*

Sec. 494. Powers of mayor 1903 Charter; organization of police force.

The duties of the mayor shall be to see that all the ordinances of the city council are faithfully executed, and he is authorized by and with the consent of the city council to organize and appoint such police force as shall be necessary to insure peace and good order of the city and the observance of law within the municipal limits. He shall have power to appoint by and with the consent of the city council, all officers of the city who are not made elective by this charter. He shall have the power to bid in all property for the city at any and all judicial sales, or sales under process of law, where the city is a party; to make pro tempore appointments to fill vacancies caused by death, sickness, absence or other disability of any city officer, but he shall not have the power to fill vacancies in the members of the board of commissioners of public works or of the city council. (Ch. 4883, Laws of Florida 1899; Ch. 5363, § 7, Laws of Florida 1903)

Sec. 495. Arrest with and without warrant.

The chief of police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person. (Ch. 4883, Laws of Florida 1889; Ch. 5363, § 17, Laws of Florida 1903)

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*Cross references—For the creation of a police department, see § 142; for the designation of the duties of the police department and the chief of police, see § 143; for the designation of the duties of the chief of police, see § 153.

He shall be the clerk of the board of representatives, and shall also act as ex-officio clerk of the municipal court. The clerk shall give such bond as the board of representatives may fix, and shall perform all the duties now or hereafter imposed upon him by law or ordinance not inconsistent with the provisions of this revised charter. The city clerk shall be paid as compensation for his services the sum of $3,600.00 per year, payabble in monthly installments. (Rev. Char., § 22, 1927)

Editor's note—The salary of the city clerk was $6000 as fixed by § 160 (see § 160.01).

Sec. 160. Same—Salary, 1957.

That beginning October 1, 1957, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa, shall be six thousand dollars ($6,000.00) per annum, payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts Ch. 57-1908, § 1)

Editor's note—The salary of the clerk as established in the year 1949 is contained in § 161 and § 393.

Sec. 1160.01. Same—Salary, 1965.

Beginning October 1, 1965, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of the city clerk of the City of Tampa shall be seven thousand five hundred dollars ($7,500.00) per annum payable in equal monthly installments in the manner and form as now provided by law. (Sp. Acts, Ch. 65-2301, § 1)

Editor's note—Section 160.01, derived from Ch. 65-2301, § 1, supersedes the provisions regarding the city clerk's salary contained in previous enactments, as compiled in §§ 159, 161, and 393.

Sec. 160.1. Same—Appointment of deputies; powers.

The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself in-

cluding but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court. (Special Acts, Ch. 61-2915, § 1)

Cross reference—Section 415 empowers the city to make provision for a clerk of the municipal court.

Sec. 161. Salaries of mayor, clerk and attorney.

That beginning October 1, 1949, in lieu of any and all salary or compensation as now fixed by law, the full salary and compensation of each of the officers of the City of Tampa, Florida, hereinafter enumerated shall be in the following amounts per annum:

Mayor $10,000.00

* * * * *

by attachment summarily against the person and property of the delinquent if the same can be found. Provided, that the penalty enforced shall in no case exceed imprisonment for more than six months or a fine of five hundred dollars, either or both; (2). they shall have power to remit fines and commute sentences imposed by the municipal judge; and

(d) In addition to the powers hereinbefore enumerated, the city council shall have the power and perform all the duties imposed upon them by the laws of Florida, now in force and which may hereafter be enacted, providing for the government of cities and towns, not inconsistent with the provisions of this act; and the mayor, chief of police, clerk, treasurer, tax assessor and tax collector, and other officers, shall have the powers and perform all the duties conferred and imposed upon them by general law.

(e) The said council shall have the power to fix and establish fire limits in said city and to prescribe rules and regulations for the erection and repair of buildings in said city; provided, that the fire limits as now established shall not be decreased except by unanimous consent of all persons owning property in any block to be

taken out of said fire limits. The city council shall also pass such ordinances as may be necessary to protect and preserve peace and order upon all property owned, leased, managed or controlled by said city outside of the city. (Special Acts, 1917, Ch. 7714, § 3; Special Acts, Ch. 61-2927, § 3)

Cross reference—For the powers of the city generally, see §§ 3, 4.

Sec. 5.1. Rewards for apprehension, conviction of persons committing capital crimes.

The City of Tampa is authorized to offer rewards, and to appropriate funds for the payment of such rewards, to a person or persons furnishing information resulting in the apprehension and conviction of any person or persons committing a capital crime within the corporate limits of the city. (Special Acts Ch. 59-1913, § 1)

Cross references—Authority of city to make appropriations for necessary municipal purposes, § 242; authority of city to provide group life, accident, hospitalization, annuity insurance, § 492.1.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT
JULY TERM, A.D. 1970

Case No. 70-62

GERALD SHADWICK,
Appellant,
v.
CITY OF TAMPA,
Appellee.

Opinion filed June 24, 1970

Appeal from the Circuit Court
for Hillsborough County;
Neil C. McMullen, Judge

Malory B. Frier, Tampa, for
Appellant.

Gerald H. Bee, Assistant City
Attorney, Tampa, for Appellee

HOBSON, CHIEF JUDGE

Appellant was charged in Tampa Municipal Court of careless driving while his ability to drive was impaired. He had been arrested under a warrant issued in the name of the city clerk of the City of Tampa, and signed by a deputy clerk. Appellant moved to quash the warrant in the municipal court on the grounds that the issuance of a warrant by a city clerk was the exercise of a judicial function by a non-judicial officer, and therefore a violation of the separation of powers under Fla. Const. Art. II, § 3 (1968), and Fla. Const. Art. V, § 1 (1968) which vests the judicial power in the courts of the state. Appellant's motion was denied, and he petitioned the Circuit Court of Hillsborough County for a writ of common law certiorari to review the denial of his motion to quash the warrant. The petition was denied by the Circuit Court, and the appellant appealed to the Supreme Court of Florida. The Supreme Court

found the matter to be within the jurisdiction of this court and transferred the case here.[1]

Appellant contends that Fla. Stat. § 168.04 (1967),[2] and Sections 495[3] and 160.1[4] of the charter of the City of Tampa are unconstitutional insofar as they purport to vest in the city clerk the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest. These and like provisions have been dealt with before by Florida courts,[5] but the constitutionality of the procedure has not been raised in this state.

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[1] F.A.R. 2.1(a)(5)(d).

[2] Fla. Stat. § 168.04 (1967): "Clerk and Marshal May Take Affivits and Issue Warrants

"The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaint and issue warrants for the arrest of persons complained against."

[3] Laws of Fla. 1903, Ch. 5363, § 17:

"The Chief of police, or any policeman of the city of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before a judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person."

[4] Laws of Fla. 1961, Ch. 61-2915, §1:

"The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court."

[5] United States v. Melvin, 258 F.Supp. 252 (S. D. Fla. 1966); Headley v. State ex rel. Bethune, 166 So.2d 479 (Fla. App. 3d 1964).

Appellant contends that the decision as to whether a warrant should issue is a judicial function and that because the legislature may not exercise judicial functions, it may not delegate judicial functions by statute to non-judicial officers. We disagree, and hold that the decision whether to issue a warrant is, at most, quasi-judicial and not within the "judicial power" reserved by the constitution to the judicial branch. *See generally* Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930). *E.g.* Krelhaus v. City of Birmingham, 164 Ala. 623, 51 So. 297 (1909); State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968); State v. Thompson, 151 S.E.2d 870 (W. Va. 1966); *cf.* State v. Furmage, 250 N. C. 616, 109 S.E.2d 563 (1959). *Contra,* State v. Paulick, 277 Minn 140, 151 N.W.2d 591 (1967).

State v. Paulick, supra, relied upon heavily by appellant, dealt with the very question before this court in the case sub judice. There, the Supreme Court of Minnesota held that a statute which vested authority to issue arrest warrants in clerks of municipal courts was unconstitutional as a violation of the separation of powers. Although the court's opinion is scholarly and appealing, we choose to follow the reasoning of the Supreme Court of New Jersey in State v. Ruoloto, supra. The court stated at pages 3-5:

> "With regard to the issuance of a warrant, there is no doubt that if a determination of 'probable cause' is to have any meaning, it must be made by a neutral and detached court official who is immune from 'the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, 333 U.S. at 14, 68 S.Ct. at 369, 92 L.Ed. at 440."
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> * * * *
>
> "A finding of neutrality, however, goes only part of the way to justify the challenged procedure. Before a deputy clerk is constitutionally permitted to determine whether the facts as alleged by the complainant constitute probable cause that an of-

fense has been committed and that the defendant is the culprit, we must ask: Is the deputy clerk qualified to exercise the necessary judgment?"

* * * *

"(W)e believe that background in the law, although desirable, is not a requirement imposed by the Constitution on a determination of probable cause. After all, probable case (sic) is a standard which is designed to be applied by laymen. A policeman may make an arrest without a warrant where there is probable cause, i.e., where there are facts which would lead 'a man of reasonable caution' to believe a crime has been or is being committed."

* * * *

"Throughout the history of this country laymen have served in various judicial capacities, and particularly in order to determine the existence of probable cause. United States Commissioners, appointed by the United States District Courts, have been invested with the power to issue arrest warrants in federal prosecutions. Fed. Rules Crim. Procedure 3, 4. Today, almost one-third of the United States commissioners are laymen. See Staff Memorandum, Subcommittee on Improvements in Judicial Machinery, reproted (sic) in Hearings, Senate Judiciary Committee, Federal Magistrates Act, 1967, p. 30. A grand jury, from which lawyers are routinely excluded, applies the standard of probable cause in determining whether to return an indictment. Grand jurors and petit jurors apply sundry rules of law to factual complexes; our jury system rests upon the premise that one need not be a lawyer to understand guiding principles and to make judgment in the light of them."

We feel that the emphasis should not be placed upon fine distinctions between judicial officers and non-judicial officers but instead upon the requirement that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable

cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces of law enforcement[6] and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public.

Appellant argues that the city, by allowing the clerk to issue arrest warrants, was providing nothing more than a "rubber stamp" for the police. If this were the case, it would be clearly unacceptable. However, there is nothing in the record to substantiate this allegation.

For the reasons stated, we hold the challenged statutes constitutional and the order appealed is

AFFIRMED.

LILES and McNULTY, JJ., CONCUR.

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[6] *E.g.* State v. Mathews, 270 N. C. 35, 153 S.E. 2d 791 (1967); State ex rel. White v. Simson, 28 Wis.2d 590, 137 N.W. 2d 391 (1965).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of October, 1971, a copy of the foregoing Motion to Dismiss or Affirm and Appendices was mailed, postage prepaid, to Malory B. Frier, Esquire, 1809 North Howard Avenue, Tampa, Florida 33607, Attorney for Appellant. I further certify that all parties required to be served have been served.

WM. REECE SMITH, JR.
Counsel for Appellee.